

1-1-2010

A National Security Puzzle: Mosaic Theory and the First Amendment Right of Access in the Federal Courts

Michael P. Goodwin

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

 Part of the [Communications Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Michael P. Goodwin, *A National Security Puzzle: Mosaic Theory and the First Amendment Right of Access in the Federal Courts*, 32 HASTINGS COMM. & ENT. L.J. 179 (2010).
Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol32/iss2/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

A National Security Puzzle: Mosaic Theory and the First Amendment Right of Access in the Federal Courts

by

MICHAEL P. GOODWIN*

I.	Introduction	180
II.	Background.....	182
A.	The First Amendment, Information, and the Press	182
B.	Public Information and National Security	183
C.	Courts, Deference, and Mosaic Theory.....	185
1.	Mosaic Theory Generally.....	185
2.	Mosaic Theory in Practice.....	186
a.	Freedom of Information Act.....	187
b.	National Security Letters	188
c.	State Secrets	189
D.	Public Access to the Courts	190
1.	Rights of Access in General.....	190
2.	Access to Records and Documents.....	193
3.	Deference to Executive Secrecy.....	195
4.	The Risks of Access.....	198
III.	Analysis	200
A.	Denials of Access to Documents Infringes on First Amendment Rights	200
1.	History Supports Broad Access Rights to Court Records.....	200
2.	Access to Documents Plays a Crucial Role.....	201
B.	The First Amendment Demands a Detailed Argument to Support Closure	201
C.	Courts Should Protect Only as Much Information as Necessary to Protect National Security	203
D.	Narrow Tailoring Requires Case-by-Case Analysis	204
E.	Federal Courts Can Effectively Exercise a Searching Review	204
F.	Overreliance on Mosaic Theory Undermines Judicial Independence	205
G.	Deference May be Appropriate in Some Cases.....	205
IV.	Conclusion	206

* The author, a former newspaper reporter, is a licensed attorney currently serving as an AmeriCorps VISTA member at Southern Minnesota Regional Legal Services in St. Paul, Minn. I wish to thank Professor Steven R. Swanson, Hamline University School of Law, for his thoughtful comments and suggestions on an earlier draft of this article. I also wish to thank the staff of the *Hastings Communications and Entertainment Law Journal*.

History teaches us how easily the spectre of a threat to “national security” may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government’s insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.¹

I. Introduction

For more than eight years, the United States government has fought a very expensive and highly controversial war on terrorism.² As questions have arisen about the means chosen to fight this war, the battle has, in some cases, moved into the federal courts. Given what is at stake, public interest in these proceedings is usually high.

Tension can arise, however, between the government’s need to protect sensitive information and the judicial system’s tradition of openness. As the Supreme Court has recognized, the courts are public institutions with long histories of public access.³ While openness has the salutary effects of promoting public accountability and understanding of the judicial system, there is a fear that sensitive information used in the judicial process could find its way into the wrong hands.⁴ Courts have struggled to balance these interests since the Supreme Court last weighed in on the public right of access more than 20 years ago.⁵

The tension between public information and secrecy is even more pronounced when the government justifies secrecy based on “mosaic theory”—the idea that even apparently innocuous information could be

1. *In re Wash. Post Co.*, 807 F.2d 383, 391–92 (4th Cir. 1986).

2. Although the current administration appears to be avoiding use of the term “global war on terrorism,” the United States Department of Justice has called fighting terrorism its “top priority.” U.S. DEPARTMENT OF JUSTICE, FACT SHEET 08-807, JUSTICE DEPARTMENT COUNTER-TERRORISM EFFORTS SINCE 9/11 (2008). A recent survey by the Government Accountability Office estimated that Congress had appropriated \$808 billion to the Department of Defense alone in support of the global war on terrorism launched in response to the 9/11 terrorist attacks. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-09-449R, GLOBAL WAR ON TERRORISM: REPORTED OBLIGATIONS FOR THE DEPT. OF DEFENSE (2009).

3. *See infra* notes 79–110 and accompanying text (discussing Supreme Court cases defining the First Amendment rights of access to judicial proceedings).

4. *See, e.g.*, Michael Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15 (describing alleged security breaches as a result of public trials of terror suspects).

5. *See infra* notes 111–15 and accompanying text (noting the uncertain scope of the Supreme Court’s First Amendment access cases).

harmful if pieced together by a knowledgeable observer.⁶ Mosaic theory has had a profound impact on Freedom of Information Act (“FOIA”) litigation.⁷ As terrorism-related cases play out in federal civil and criminal litigation, mosaic theory has the potential to affect First Amendment access jurisprudence as well. For example, in November of 2009, the Justice Department announced plans to prosecute five alleged 9/11 co-conspirators in a Manhattan federal court, despite concerns about the courts’ ability to protect classified information.⁸ The Ninth Circuit Court of Appeals recently allowed a lawsuit to proceed over the government’s argument that the suit would result in the disclosure of secret information about extraordinary rendition.⁹ In *Boumediene v. Bush*, the Supreme Court ruled that prisoners detained at the Guantanamo Bay detention camp had the right to challenge their detention in a federal habeas corpus proceeding.¹⁰ In the first such case to reach the federal district court level, the courtroom was promptly closed after opening statements.¹¹ The intense public interest in these and similar cases—and the near certainty that sensitive information will have to be filed with the court—will require federal courts to weigh the public’s “right to know” against the dangers of disclosure.

There is undoubtedly a public interest in national security, and secrecy is sometimes necessary to further that interest. On the other hand, history has shown that national security can be used as a pretext for unnecessary secrecy, and secrecy itself breeds distrust of the government and contempt for the

6. As one court observed:

[T]he business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.

Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978).

7. See generally David E. Pozen, Comment, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005).

8. Charlie Savage, *Accused 9/11 Mastermind to Face Civilian Trial in N.Y.*, N.Y. TIMES, Nov. 14, 2009, at A1. See also David Johnston, *U.S. Will Give Al Qaeda Suspect a Civilian Trial*, N.Y. TIMES, Feb. 26, 2009, at A1 (describing plans to bring federal criminal charges against Ali Saleh Kahlal al-Marri).

9. Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 949 (9th Cir. 2009).

10. 128 S. Ct. 2229, 2277 (2008).

11. William Glaberson, *Judge Opens First Habeas Corpus Hearing on Guantanamo Detainees*, N.Y. TIMES, Nov. 7, 2008, at A21. The judge later ordered five of the six men who were party to that proceeding to be released because the government lacked sufficient evidence to justify their continued detentions. William Glaberson, *Judge Declares Five Detainees Held Illegally*, N.Y. TIMES, Nov. 21, 2008, at A1.

judicial system.¹² Therefore, while some secrecy is legitimately necessary, there is an equally strong public interest in transparency.

This article examines the judicial system's role in checking government-imposed secrecy with respect to documents filed in federal court, with particular emphasis on how mosaic theory does—and does not—change the analysis. Part II discusses the relationship between public information and national security, and examines legal and philosophical underpinnings of the First Amendment right of access.¹³ Part II also discusses the emergence of mosaic theory, and discusses its treatment by the courts in different types of cases before discussing its application to access jurisprudence.¹⁴ Part III explains the significance of the Supreme Court's access jurisprudence to judicial documents.¹⁵ Part III also argues that the mosaic theory threatens First Amendment access rights and undermines judicial independence.¹⁶ Although recognizing that deference may be appropriate in some cases, this article concludes that mosaic theory should not be used to erode the requirement that closure be supported by a specific showing of harm.¹⁷

II. Background

A. The First Amendment, Information, and the Press

The First Amendment of the U.S. Constitution provides that “Congress shall make no law . . . abridging freedom of speech, or of the press”¹⁸ Scholars have debated the precise scope of this facially absolute provision throughout history, but it is generally agreed that the First Amendment recognizes the importance of information to democratic self-government.¹⁹ The Founders saw the free flow of information as an important check on government power.²⁰

12. See *infra* notes 18–38 and accompanying text (discussing abuses of national security as a pretext for imposing unnecessary secrecy).

13. See *infra* notes 18–117 and accompanying text.

14. See *infra* notes 40–78 and accompanying text.

15. See *infra* notes 153–162 and accompanying text.

16. See *infra* notes 163–98 and accompanying text.

17. See *infra* notes 200–04 and accompanying text.

18. U.S. CONST. amend. I.

19. See generally Jeffery A. Smith, WAR AND PRESS FREEDOM 28 (1999). See also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion) (“These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”).

20. See Justice Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 635–37 (1974) (arguing that the Press clause serves as a structural check on government power). See also Smith, *supra* note 19, at 28. In rebuffing a broad request for closure of administrative proceedings, the Sixth Circuit stated:

With its specific mention of the press, the First Amendment also seems to recognize the role of third parties in disseminating information and opinions to citizens. While the Supreme Court has recognized the role of news organizations as a surrogate for the public,²¹ however, the Court has repeatedly rejected special access privileges for the press.²² Thus, although the Court has consistently been hostile to government censorship of printed material,²³ it has accepted other restraints on the press.

B. Public Information and National Security

The relationship between public information and national security is complicated. On the one hand, the public's compelling interest in national security necessarily requires information control, which in turn requires reasonable restrictions on public access.²⁴ On the other hand, national security is highly newsworthy and public knowledge about national security matters is no less important than any other aspect of government operations. It is also not clear that greater secrecy leads to greater security; in fact, it may even decrease security by diminishing the public's capacity to recognize and respond to security threats.²⁵ Furthermore, the executive branch has a long

A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution. "Fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, [the Framers of the First Amendment] sought to give this new society strength and security by providing that freedom of speech, press, religion and assembly should not be abridged."

Detroit Free Press v. Ashcroft, 303 F.3d 681, 710 (6th Cir. 2002) (quoting *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J. concurring)).

21. *Richmond Newspapers, Inc.*, 448 U.S. at 572–73.

22. *See, e.g.* *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (refusing to recognize First Amendment right of access to prisons for purposes of reporting on prison conditions); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (plurality opinion) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.").

23. *See N.Y. Times Co.*, 403 U.S. at 714 (internal quotations omitted) ("Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity.").

24. *E.g.*, *Haig v. Agee*, 453 U.S. 280, 307 (1981) (recognizing national security as a compelling interest); *Dept. of Navy v. Egan*, 484 U.S. 518, 527 (1988) (recognizing a compelling interest in withholding classified information for national security purposes).

25. *See* Pozen, *supra* note 7, at 674. *See also* Meredith Fuchs, *Judging Secrecy: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 136–39 (2006) (discussing dangers of over classification generally). According to Justice Stewart, public information is essentially the *only* check on executive power in the national security arena:

In the absence of governmental checks and balances present in other areas of our national life, the only effective restraint on executive power and policy in the areas of national defense and international affairs may lie in an enlightened citizenry –

history of using “national security” as an excuse for excessive secrecy. Studies have documented the use of national security as a pretext to shield potentially controversial or embarrassing government operations from public view.²⁶

There is perhaps no better example of this than *N.Y. Times v. United States*,²⁷ commonly known as *The Pentagon Papers Case*, one of the most famous cases to explore the tension between the First Amendment and national security. In *The Pentagon Papers Case*, the government sought to enjoin the *N.Y. Times* and the *Washington Post* from publishing the contents of a Department of Defense study of the Vietnam War.²⁸ The Court issued a brief per curiam opinion holding that the government failed to carry the heavy burden necessary to justify a prior restraint on publication, followed by separate concurring opinions by each justice.²⁹ While the case is notable for reaffirming the First Amendment’s hostility to prior restraints, it is also notable because the government’s asserted national security interests in restraining publication turned out to be “a mirage.”³⁰

In a similar vein is *Ex parte Quirin*,³¹ in which a team of German saboteurs were captured, convicted, and executed in a span of two months in the summer of 1942.³² Separate teams of saboteurs landed on beaches in New York and Florida with plans to destroy targets of strategic and symbolic importance.³³ To great fanfare, the FBI apprehended the men before they could carry out the plan, and the men were tried and convicted in a military commission proceeding that was closed to the public and the press.³⁴ The Supreme Court denied the men’s petitions for habeas corpus,³⁵ and six of the eight were executed that summer. Years later, the declassified case file

in an informed and critical public opinion which alone can here protect the values of democratic government.

N.Y. Times Co., 403 U.S. at 728 (Stewart, J., concurring).

26. See Fuchs, *supra* note 25, at 134–36; Christina E. Wells, *CLA v. Sims: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 867–68 (2006).

27. 403 U.S. 713 (1971).

28. *Id.* at 714.

29. Three of the justices—Burger, Harlan and Blackmun—dissented. *Id.* at 748, 752.

30. BEN BRADLEE, A GOOD LIFE 323 (1995). Bradlee, the *Washington Post*’s managing editor during the *Pentagon Papers* case, points out that none of the government officials involved in the case ever contradicted Solicitor General Erwin Griswold’s later confession that he had not seen “any trace of a threat to national security from the Pentagon Papers publication.” *Id.* (quoting from Griswold’s Feb. 15, 1989 op-ed in the *Washington Post*).

31. 317 U.S. 1 (1942).

32. See generally Edward J. Klaris et al., *The Press and Public’s First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 22 CARDOZO ARTS & ENT. L.J. 767, 782–89 (2005) (describing the facts of the case).

33. *Id.* at 782–83.

34. *Id.* at 784–86 (describing the secrecy surrounding the trial).

35. *Ex parte Quirin*, 317 U.S. at 21.

revealed that the FBI had had little to do with foiling the Nazi plan; rather, two of the saboteurs had defected and revealed the entire plan to authorities.³⁶ One of the prosecutors in the case later suggested that the “major reason” for the trial’s closure was to preserve the illusion that the FBI had foiled the plot by itself.³⁷ Two of the Supreme Court justices later indicated that they regretted ruling so quickly.³⁸

C. Courts, Deference, and Mosaic Theory

1. *Mosaic Theory Generally*

Although these cases illustrate how secrecy can be abused, there is little question that the effective conduct of foreign and military affairs requires a certain degree of secrecy. This often puts the judiciary in the position of balancing the interests in secrecy against the interests of disclosure. In some cases this is easy, such as when public disclosure would alert the target of an investigation of the government’s interest in him.³⁹ Other cases present less obvious dangers of disclosure. Modern intelligence gathering is like fitting together a puzzle, in which inferences are drawn from seemingly disparate pieces of information.⁴⁰

This theory of intelligence gathering is known as “mosaic theory.”⁴¹ Mosaic making—essentially the inference-drawing process described above—has long been recognized as an effective method of gathering intelligence.⁴² Some of the puzzle pieces almost certainly come from public sources; training material recovered from al-Qaeda camps, for example, indicates that terrorist intelligence officers regularly mine government web sites for information.⁴³ Advances in technology have made mosaic making an even more powerful tool.⁴⁴

Mindful of the sophistication of intelligence gathering, and perhaps fearful of the consequences of being wrong, some courts are reluctant to

36. Klaris et al, *supra* note 32, at 787–88.

37. *Id.* at 788.

38. *Id.* at 789 (discussing the subsequent comments by Justice Frankfurter and Justice Douglas).

39. *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 491 (FISA Ct. 2007) (holding that public access to records of the Foreign Intelligence Surveillance Court would frustrate the very purpose of the court).

40. Wells, *supra* note 26, at 853.

41. *Id.*

42. *Id.* See also NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 88 (2004) [hereinafter 9/11 COMMISSION REPORT].

43. Donald F. Rumsfeld, Sec. of Defense, *Cable to RUHH subscribers* (Jan. 14, 2003), available at <http://www.fas.org/sgp/news/2003/01/dodweb.html> (describing al-Qaeda use of government web sites to gather information).

44. See 9/11 COMMISSION REPORT, *supra* note 42, at 88 (describing the use of technology in intelligence gathering).

challenge the executive branch's need for secrecy. In *United States v. Marchetti*, the seminal case on the issue, the court reasoned as follows:

There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve efficiently in the review of secrecy classifications in that area.⁴⁵

In the courts, mosaic theory has been applied not only to the classified information that was at issue in *Marchetti*, but also to non-classified information that is deemed sensitive by the executive branch.⁴⁶ The *Marchetti* reasoning was later endorsed by the Supreme Court in *CLA v. Sims*, a FOIA case in which the petitioners had sought disclosure of CIA research on brainwashing techniques.⁴⁷ Thus, when the information could be part of a mosaic, the impact of disclosing a particular document "must be evaluated not only based on the information appearing within the four corners of the document, but also with regard to secrets the document could divulge when viewed in light of other information available to interested observers."⁴⁸

2. *Mosaic Theory in Practice*

In addition to court access cases, mosaic theory has had a significant effect in three kinds of cases: Those involving FOIA, National Security Letters, and state secrets. Although each of these bodies of jurisprudence is analytically distinct, each requires the court to weigh necessity of secrecy against the countervailing interests in disclosure. Each will be discussed in turn.

45. *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) (enjoining former CIA employee from publishing book about the agency). See also Pozen, *supra* note 7, at 638–41 (2005) (tracing the origins of the mosaic theory from *Marchetti*). The *Marchetti* reasoning was later endorsed by the Supreme Court in *CLA v. Sims*, a FOIA case in which the petitioners had sought disclosure of CIA research on brainwashing techniques. *CIA v. Sims*, 471 U.S. 159, 178 (1985). *Sims*, in turn, has been cited by a number of federal courts to deny access under the Freedom of Information Act. Pozen, *supra* note 7, at 643.

46. See, e.g., *Ctr. for Nat'l Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918 (D.C. Cir. 2003). The "sensitive but unclassified" designation began in the Reagan administration and was revived by the George W. Bush administration. Wells, *supra* note 26, at 867.

47. 471 U.S. at 177–78.

48. *Berman v. CIA*, 501 F.3d 1136, 1143 (9th Cir. 2007) (denying historian's FOIA request for Vietnam-era presidential intelligence briefings).

a. Freedom of Information Act⁴⁹

Mosaic theory has had its greatest impact in FOIA litigation.⁵⁰ The Act contains nine categories of government information that are exempt from disclosure under FOIA, including classified national security information and information related to ongoing law enforcement investigations.⁵¹ Although FOIA grants district courts the power to review government classification decisions *de novo*, the statute itself provides that the court is to afford “substantial weight” to the agency’s supporting affidavits, provided that they are reasonably specific and there is no evidence of bad faith.⁵² Moreover, as national security is a function of the executive branch, there is a natural reluctance on the part of courts to conduct a searching inquiry into the propriety of withholding national security information, and courts generally afford a high degree of deference to agency’s determination that disclosure presents a security risk.⁵³ Generally, if there is no evidence of bad faith and the government’s supporting affidavits specifically describe how the information could compromise national security, the court’s inquiry ends there.⁵⁴

Although mosaic theory has been broadly endorsed by the courts, it has also proven controversial because of its potential to shield broad categories of information from the public.⁵⁵ This controversy took center stage in *Center for National Security Studies v. U.S. Department of Justice* (hereinafter “CNSS”).⁵⁶ At issue in CNSS was a request by various advocacy groups for broad disclosure of information related to the government’s post-9/11 detention of various persons.⁵⁷ Noting that “the judiciary is in an extremely poor position to second-guess the executive’s judgment in this area of national security,” the court credited the government’s argument that the list of detainees and the circumstances of each arrest would provide terrorist organizations with “a composite picture of the government investigation.”⁵⁸ Moreover, the court

49. 5 U.S.C. § 552 (2006).

50. See generally Pozen, *supra* note 7.

51. 5 U.S.C. § 552(b)(1), (7). FOIA also exempts information that is specifically exempted by another statute, such as the National Security Act. 5 U.S.C. § 552 (b)(3). The FOIA does not apply to information maintained by the federal courts. See 5 U.S.C. § 551(1)(B) (2006).

52. 5 U.S.C. § 552(a)(4)(B).

53. See, e.g., *Krikorian v. Dept. of State*, 984 F.2d 461, 464 (D.C. Cir. 1993) (“[A] reviewing court must recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into [national security matters]”); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) (“Judges . . . lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case.”).

54. See U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE 145 (2009).

55. See Pozen, *supra* note 7, at 631.

56. 331 F.3d 918, 920 (D.C. Cir. 2003).

57. *Id.* The plaintiffs sought, *inter alia*, the names of the individuals and details of their arrests.

58. *Id.* at 928. The court justified its deference as follows:

held that releasing *any* of the information sought by the plaintiffs could interfere with the investigation because even “bits and pieces” of seemingly innocuous data could be used to map the government’s investigation.⁵⁹

Judge Tatel authored a lengthy dissent.⁶⁰ Conceding that withholding some of the information may have been legitimate, Judge Tatel faulted the court’s “uncritical deference to the government’s vague, poorly explained arguments for withholding broad categories of information about the detainees.”⁶¹ Although deference to the executive branch is appropriate in national security matters, “requiring agencies to make the detailed showing FOIA requires is not second-guessing their judgment about matters within their expertise.”⁶² The government, according to Judge Tatel, should have been required to make its case for secrecy detainee-by-detainee.⁶³

b. National Security Letters

The government has also used mosaic theory to justify a provision of the USA PATRIOT Act that authorizes the collection of customer information from internet service providers and bars the ISPs from disclosing the existence of the inquiries.⁶⁴ This type of administrative subpoena is called a National Security Letter (“NSL”).⁶⁵ In *John Doe, Inc. v. Mukasey*, the Second Circuit Court of Appeals partially invalidated these provisions on First Amendment grounds.⁶⁶ More importantly for purposes of this discussion, the

[I]n undertaking a deferential review we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch’s proper role.

Id. at 932. Notably, the FBI’s affidavit in support of its motion not been prepared specifically for the case at hand, but rather for an unrelated case in Michigan. *See* *Ctr for Nat’l Sec. Studies v. U.S. Dept. of Justice*, 215 F. Supp. 2d 94, 104 (D.D.C. 2002).

59. *Ctr for Nat’l Sec. Studies*, 331 F.3d at 928–29. The government voluntarily released the names of detainees who were criminally charged. *Id.* at 933. The court rejected the petitioners’ attempt to assert a First Amendment right of access to the information because the petitioners sought broad disclosure of information related to all of the detainees, not just that of one individual. *Id.* at 934.

60. *Id.* at 937–52.

61. *Id.* at 937.

62. *Id.* at 939.

63. *Id.* at 945.

64. *See* 18 U.S.C. § 2709 (2006). *See also* *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 865–68 (2d Cir. 2008) (describing FBI program). In a previous round of litigation over the program, the government had explicitly invoked mosaic theory to keep the identity of the NSL recipient a secret. *See Doe v. Gonzales*, 386 F. Supp. 2d 66, 76 (D. Conn. 2005).

65. *See Mukasey*, 549 F.3d at 864.

66. *Id.* at 885.

court rejected the statute's limited provision for judicial review, which required the district court to treat the executive branch's determination of a threat as conclusive absent a showing of bad faith.⁶⁷ According to the court, the government might well be justified in enforcing the gag provision in the interest of national security.⁶⁸ That disclosure *might* compromise national security, however, did not justify infringement on First Amendment rights.⁶⁹ To justify the gag order in a particular case, therefore, the government must "at least indicate the nature of the apprehended harm and provide a court with some basis to assure itself (based on in camera presentations where appropriate) that the link between disclosure and risk of harm is substantial."⁷⁰ To allow the government to rest on conclusory assurances of a threat would "cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct."⁷¹

c. State Secrets

Another context in which the judiciary is required to scrutinize the government's need for secrecy is when the government asserts the state secrets privilege. In contrast to FOIA cases, in which the plaintiff is seeking public disclosure of a document, the state secrets privilege arises when a civil plaintiff seeks discovery of information that implicates diplomatic, military, or intelligence-gathering tactics.⁷² Recognizing that the executive branch has expertise in the area of national security, courts typically accord deference to the executive's need for secrecy.⁷³ The scope of the deference is not unlimited, however, as "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."⁷⁴ An independent, in camera evaluation of the evidence for which the privilege is sought is therefore crucial to avoid abuse of the privilege.⁷⁵ As one court described its in camera review:

67. *Id.* at 881–83.

68. *See id.* at 882 (The Executive Branch's judgment that disclosure of the NSL threatens national security "is not to be second-guessed, but a court must receive some indication that the judgment has been soundly reached.").

69. *Id.* at 881.

70. *Id.*

71. *Id.* (citation omitted).

72. *See* Amanda Frost, *The State Secrets Privilege and the Separation of Powers*, 75 FORDHAM L. REV. 1931, 1935–36 (2007).

73. *Mohamed v. Jeppensen Dataplan, Inc.*, 579 F.3d 943, 953 (9th Cir. 2009); *In re Sealed Case*, 494 F.3d 139, 144 (D.C. Cir. 2007).

74. *Mohamed*, 579 F.3d at 953 (quoting *Reynolds v. United States*, 345 U.S. 1, 9–10 (1953)).

75. *Id.* at 959 n.8; *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007).

We take very seriously our obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege. Simply saying "military secret," "national security" or "terrorist threat" or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege. Sufficient detail must be . . . provided for us to make a meaningful examination.⁷⁶

As the scope of the disclosure is narrower in state secrets jurisprudence, mosaic theory has perhaps left a smaller footprint in this body of jurisprudence.⁷⁷ Nevertheless, because state secrets cases expose executive operations to potential scrutiny, the judiciary evaluates the need for secrecy in much the same manner as FOIA cases.

The mosaic theory thus arises in a variety of contexts. The next section of this paper examines the law of access to court documents in more detail. This paper then discusses how courts have analyzed access cases, with a focus on the few cases that have discussed mosaic theory.

D. Public Access to the Courts

1. *Rights of Access in General*

Accompanying every case filed in any federal court, whether criminal or civil, is an often voluminous paper record of motions, memoranda, and affidavits. As discussed above, the Supreme Court has consistently refused to recognize a "newsgathering" right for reporters over and above the access rights belonging to the general public.⁷⁸ Access to judicial records, therefore, is rooted in the public's "right of visitation."⁷⁹

There is a long tradition of openness in the Anglo-American legal tradition. English law recognized a general public right to inspect and copy judicial records as early as 1372, but enforcement of this right was limited to those with evidentiary or proprietary interest in the case.⁸⁰ American courts have generally imposed no such requirement, although courts have restricted

76. *Al-Haramain*, 507 F.3d at 1203.

77. *But see, e.g., Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) (endorsing use of mosaic theory and dismissing, on state secrets grounds, allegations that military had improperly stored and disposed of hazardous waste); *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (invoking mosaic theory in the state secrets context). *See also Wells*, *supra* note 26, at 864 (noting "increasing" use of mosaic theory in state secrets cases).

78. *See supra* note 22 and accompanying text.

79. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980).

80. William Ollie Key, Jr., *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 GA. L. REV. 659, 666 (1982) (discussing common law right of access).

access to “sensitive” records, such as juvenile proceedings and divorce cases.⁸¹ Courts are more willing to close these types of proceedings because the often painful personal details that are revealed in a case would unnecessarily embarrass private citizens.⁸²

The Supreme Court recognized the public nature of judicial documents as early as 1834.⁸³ A series of cases in the 1980s defined the nature of the public rights of access to the courts, although each of these cases dealt with access to proceedings as opposed to documents. The Supreme Court first recognized a First Amendment right of access to *criminal trials* in *Richmond Newspapers v. Virginia*.⁸⁴ In that case, the trial judge in a state criminal trial had cleared the courtroom at the request of the defendant’s attorney, who feared that excessive media coverage could prejudice his client’s right to a fair trial.⁸⁵ The Virginia Supreme Court upheld the closure, but the United States Supreme Court reversed.⁸⁶ The plurality opinion, written by Chief Justice Burger, recognized that criminal trials had historically been open to the public, and that openness contributed to the fairness, reliability, and legitimacy of the proceedings.⁸⁷ In addition to these benefits, open trials have a “therapeutic value” for a community in which a crime has occurred, “providing an outlet for community concern, hostility and emotion.”⁸⁸ Accordingly, the plurality held that there is a First Amendment right of access to criminal trials that may not be infringed “[a]bsent an overriding interest articulated [by the trial court.]”⁸⁹ Chief Justice Burger also noted that, although the press had no greater right of access than the general public, the press covered criminal proceedings as “surrogates of the public.”⁹⁰

In an influential concurrence, Justice Brennan wrote that whether a First Amendment right of access attaches to the proceeding in question “must be

81. *Id.* at 667–68.

82. *See* *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978) (internal quotations omitted) (noting that the court file in such cases could be used to “gratify private spite or promote public scandal.”).

83. *Wheaton v. Peters*, 33 U.S. 591, 593 (1834) (holding that publisher cannot have a copyright on federal judicial opinions).

84. 448 U.S. 555 (1980).

85. *Id.* at 559–61.

86. *Id.* at 555.

87. *Id.* at 569. Justice Burger’s opinion traced the history of open trials back to pre-Norman English history. *Id.* at 565. Justice Burger’s opinion was joined by Justice Stevens and Justice White. *Id.* at 558. Justice Brennan authored a concurring opinion, which was joined by Justice Marshall. *Id.* at 584–98. Justice Stewart and Justice Blackmun each wrote separate concurring opinions. *Id.* at 598–601, 601–04. Justice Rehnquist dissented. *Id.* at 604–06.

88. *Id.* at 570–71.

89. *Id.* at 581.

90. *Id.* at 572–73. Other justices were more amenable to recognizing a “newsgathering right.” *Id.* at 583–84 (opinion of Stevens, J., concurring). *See also id.* at 585 n.2 (opinion of Brennan, J., concurring).

strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances.”⁹¹ If the First Amendment right of access is implicated, only a compelling state interest can reverse the presumption of openness.⁹² Brennan noted, without elaboration, that national security was one countervailing interest that may warrant closure of a proceeding.⁹³

Two years after *Richmond Newspapers*, a majority of the Supreme Court adopted Brennan’s analysis.⁹⁴ In *Globe Newspaper v. Superior Court*, Brennan wrote the majority opinion as the Court struck down a Massachusetts statute that required closure of court proceedings during testimony of rape victims.⁹⁵ The Court held that the state had a compelling interest in protecting the identities of such victims, but that complete closure of the proceedings was not narrowly tailored to further that interest because the trial court had not been required to make a particularized showing of necessity in the instant case.⁹⁶

This test—an analysis of (1) historical practice and (2) the practical benefits of access in the particular situation—came to be known as the “experience and logic” test.⁹⁷ Although the experience and logic test has been described by courts as a two-prong test, it should be noted that prongs are interrelated, which suggests that the “test” should not be applied mechanically. The *Globe Newspaper* Court noted: “This uniform rule of openness has been viewed as significant in constitutional terms not only ‘because the Constitution carries the gloss of history,’ but also because ‘a tradition of accessibility implies the favorable judgment of experience.’”⁹⁸

The scope of this analysis has remained somewhat ambiguous. Because *Richmond Newspapers* and *Globe Newspaper* were decided in the context of criminal trials, neither Court had occasion to define the scope of the test as it related to documents that are filed with the court.

91. *Id.* at 597–98 (opinion of Brennan, J., concurring). Notably, Brennan mentioned that his analysis applied to “proceedings or information,” and thus conceived of the access right as applying more broadly than to the trial itself. *Id.* at 589.

92. *Id.* at 598. This is consistent with First Amendment analysis in other contexts.

93. *Id.* at 598 n.24.

94. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606–07 (1982).

95. *Id.* at 598–602. Justice O’Connor concurred, expressing her belief that *Richmond Newspapers* applied only in the context of criminal trials. *Id.* at 611. Justice Burger and Justice Rehnquist dissented. *Id.* at 612.

96. *Id.* at 609.

97. *E.g.*, *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 206 (3d Cir. 2003).

98. *Globe Newspaper*, 457 U.S. at 605 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (opinion of Brennan, J., concurring)). See also *Press-Enterprise Co. v. Super. Ct. (Press-Enterprise II)*, 478 U.S. 1, 8–9 (1986) (describing logic and experience as “two complementary considerations” that are related because “history and experience shape the functioning of governmental processes”).

2. *Access to Records and Documents*

Although the Court's subsequent public access jurisprudence broadened the categories to which the test applies, it provides little guidance as to the ultimate scope of the test. In two cases involving the *Press-Enterprise* of Riverside, California, the Supreme Court considered lawsuits by the newspaper to unseal transcripts of pre-trial criminal proceedings that had been closed to the public.⁹⁹ The Court held that the right of access attached to the proceedings in both cases, and reaffirmed that the proceedings must remain open unless the party seeking closure can articulate "an overriding interest" and the court's closure order is narrowly tailored to that interest.¹⁰⁰ The Court also refined its previous holdings to more clearly articulate the trial court's responsibility to justify closure: "The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."¹⁰¹ These findings must indicate a "substantial probability" that closure will prevent the harm, as well as no "reasonable alternatives" that will protect the interest asserted.¹⁰² In both cases, however, the Court's opinion focused on the right of access to the proceedings themselves, leaving the scope of access to documents unclear.¹⁰³

Adding some confusion to the analysis, there is another case, which pre-dates the *Richmond Newspapers* line of cases, that has been read by some courts to bear on the appropriate degree of media access to court documents. In *Nixon v. Warner Communications*, television stations sought copies of audio recordings to tapes that had been played at the criminal trials of aides to President Richard M. Nixon.¹⁰⁴ Transcripts of the tapes had been made publicly available during and after the trial, but the television stations wanted to broadcast the contents of the tapes.¹⁰⁵

The Supreme Court recognized that there was a long common law history of access to judicial records.¹⁰⁶ The Court assumed that the common law presumption of openness applied to the tapes, but held that there was only an

99. *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 513 (1984) (holding that trial judge had improperly closed a six-week jury selection proceeding in a capital murder case without articulating findings or considering alternatives to closure); *Press-Enterprise II*, 478 U.S. at 13 (holding that the First Amendment right of access attaches to preliminary hearing).

100. *Press-Enterprise I*, 464 U.S. at 510. See also *Press Enterprise II*, 478 U.S. at 9–10 (quoting *Press-Enterprise I*).

101. *Press-Enterprise I*, 464 U.S. at 510.

102. *Press Enterprise II*, 478 U.S. at 14.

103. See *id.* at 13 (mentioning the denial of the transcript, but holding that the right of access attaches to the proceeding itself). See also Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1757–58 (2006) (discussing the confusing scope of *Press-Enterprise II* as it relates to documents).

104. See *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 594 (1978).

105. *Id.*

106. *Id.* at 597.

incremental public interest in requiring the court to allow copying of the tapes.¹⁰⁷ This interest was outweighed by the risk that the tapes would be selectively edited to “gratify private spite or promote public scandal.”¹⁰⁸ Accordingly, the Supreme Court found that the trial court had not erred in denying the right to copy the tapes.¹⁰⁹ The Court held that the First Amendment did not apply to the media’s request to copy the tapes because there was “no question of a truncated flow of information to the public” in light of the fact that the media had been allowed to listen to the tapes and had been provided transcripts of the tapes, which they were free to use as they saw fit.¹¹⁰

The scope of access rights articulated in the *Richmond Newspapers* line of cases has been further delineated in the lower courts. Courts have expanded the analysis in a somewhat haphazard, case-by-case manner.¹¹¹ Circuit courts generally have extended the *Richmond Newspapers* analysis outside of the criminal context.¹¹² Approaches to documents differ to some degree.¹¹³ Some courts, though recognizing the ambiguous nature of *Warner Communications*’ First Amendment analysis, refuse to abandon that Court’s common law approach to the document question.¹¹⁴ Others recognize a First Amendment right of access to the documents only after applying the *Richmond Newspapers* test to the proceeding to which the documents attach.¹¹⁵ Still others apply the “logic and experience” test to the document itself.¹¹⁶ As one commentator has shown, these divergent applications of the test have led to

107. *Id.* at 602. The Court also held that Congress had already provided for a process governing public access to the tapes by passing the Presidential Records Act. *Id.* at 603.

108. *Id.* at 603 (citations omitted).

109. *Id.* at 608.

110. *Id.* at 609. Justice Stevens dissented, noting that the content of the tapes was already in the public domain, the presumption in favor of access and the “great historical interest” in the subject matter of the case. *Id.* at 615–16 (opinion of Stevens, J., dissenting).

111. See *In re the Application of the N.Y. Times Co. for Access to Certain Sealed Court Records* (*In re N.Y. Times Application*), 585 F. Supp. 2d 83, 87 n.4 (D.D.C. 2008) (commenting on the “piecemeal” approach to expanding the test).

112. See Levine, *supra* note 103, at 1759 n.123 (collecting cases from the lower courts).

113. *Id.* at 1742–43.

114. *Id.* at 1742. In judging a media request to access of certain documents in the Oklahoma City bombing case, for example, the Tenth Circuit noted a split within its own circuit as to whether the common law or the First Amendment governed the media’s request, although it did note that *Warner Commc’ns* was inapplicable. *United States v. McVeigh*, 119 F.3d 806, 813–14 (10th Cir. 1997). The court declined to resolve the issue, but held that even if the First Amendment applied, the sealing of the documents was justified to protect the defendant’s right to a fair trial and was narrowly tailored to that interest. *Id.* at 814–15. Similarly, the D.C. Circuit also typically analyzes access to documents using both the common law and the First Amendment. See *In re N.Y. Times Application*, 585 F. Supp. 2d at 87 n.3. The court noted that the First Amendment standard for justifying closure was more difficult for the government to meet. *Id.* at 87 n.2.

115. Levine, *supra* note 103, at 1763.

116. *Id.*

inconsistent results in the lower courts.¹¹⁷ Equally vexing, however, is the degree of deference to afford the government's need for secrecy.

3. *Deference to Executive Secrecy*

As in other kinds of access cases, First Amendment access cases present questions of judicial competence to appropriately weigh the benefits of sealing documents against the risks of disclosure. Some commentators have suggested that courts appear to be favoring deference over disclosure. A 2005 report by the Reporters' Committee for Freedom of the Press found that secrecy had "become the default status for most proceedings even remotely related to the war on terrorism" in the wake of the 9/11 attacks.¹¹⁸ The report concluded that restrictions on the right of access to such proceedings constituted a "high risk to a free press."¹¹⁹

One of the more disturbing examples of this trend toward secrecy is the case of *M.K.B. v. Warden*.¹²⁰ According to the limited facts that are available to the public about that case, M.K.B. was an Algerian-born waiter who was living in Florida when he was arrested by immigration officials in the months following the 9/11 attacks.¹²¹ After the immigration authorities initiated deportation proceedings, M.K.B. filed a petition for habeas corpus.¹²² The case was not listed on the court's public docket, however, which means that there was no official public record that the case even existed.¹²³ After the clerk of the appellate court inadvertently disclosed the existence of the case by listing it on the court's public calendar, the case was publicly docketed but all documents related to the case were listed as "sealed."¹²⁴ Thus, the case was

117. *Id.* at 1760–70 (documenting the inconsistent results reached by lower courts). Levine suggests that the Court abandon the *Richmond Newspapers* test and apply strict scrutiny to all closure requests. *Id.* at 1793.

118. REPORTER'S COMM. FOR FREEDOM OF THE PRESS, HOMEFRONT CONFIDENTIAL: HOW THE WAR ON TERRORISM AFFECTS ACCESS TO INFORMATION AND THE PUBLIC'S RIGHT TO KNOW 29 (Lucy A. Dalglish & Gregg P. Leslie eds., 2005). *See also* Levine, *supra* note 103, at 1791 (concluding that strict scrutiny of closure requests has been "infinitely flexible in fact").

119. REPORTER'S COMM. FOR FREEDOM OF THE PRESS, *supra* note 118, at 29. The report uses a threat level meter similar to that of the United States Department of Homeland Security. The levels, in descending order of risk to press freedom, are as follows: Severe, High, Elevated, Guarded, Low.

120. 540 U.S. 1213 (2004) (denying petition for certiorari).

121. *See* Petition for Writ of Certiorari, *M.K.B. v. Warden*, No. 03-6747, 2003 WL 23139103, *3 (July 1, 2003). The factual information in the petition was heavily redacted. *Id.* at *1.

122. *Id.* at *1.

123. *Id.* at *9. *See also* Meliah Thomas, Comment, *The First Amendment Right of Access to Docket Sheets*, 94 CAL. L. REV. 1537, 1540–42 (2006) (describing the function of docket sheets in federal and state courts).

124. *Petition*, 2003 WL 23139103 at *7–8. This brief error led to a story in the *Daily Business Review*. *Id.* at *7.

“heard, appealed, and decided in complete secrecy.”¹²⁵ At no time did any court make any articulated findings justifying this extraordinary level of secrecy.¹²⁶

The mosaic theory appears to have had less of an effect on court access jurisprudence than it has in the related context of FOIA law. Cases from two circuit courts, however, indicate how such arguments could fare. In *Detroit Free Press v. Ashcroft*¹²⁷ and *North Jersey Media Group v. Ashcroft*,¹²⁸ the Sixth and Third Circuits, respectively, came to opposite conclusions regarding the executive’s authority to close deportation hearings when the subject of the hearing was deemed by the government to be of “special interest” to the investigation of terrorist groups. The *Detroit Free Press* court noted that deportation hearings are quasi-judicial proceedings that are similar in many respects to courtroom trials, thus implicating many of the same concerns outlined in the *Richmond Newspapers* line of cases.¹²⁹ Rejecting the government’s mosaic theory argument, the court stated that:

there seems to be no limit to the Government’s argument. The Government could use its “mosaic intelligence” argument as a justification to close any public hearings completely and categorically, including criminal proceedings. The Government could operate in virtual secrecy in all matters dealing, even remotely, with “national security,” resulting in a wholesale suspension of First Amendment rights.¹³⁰

125. *Petition*, 2003 WL 23139103, at *9. It is not clear that mosaic theory was used as a justification for closing the docket.

126. *Id.* at *16, *19–20, *23–24. In another recent case, a Texas judge issued a secret ruling in response to a request by several American Muslim organizations to be removed from a list of unindicted co-conspirators in a criminal case alleging illegal support for terrorism. Posting of Josh Gerstein to Under the Radar, http://www.politico.com/blogs/joshgerstein/1109/Judge_snubbed_US_Islamic_groups_in_secret_ruling.html (Nov. 1, 2009, 22:27). The case was not listed on the public docket until a reporter called to ask about the decision. *Id.* The Third Circuit recently announced that it would no longer allow appellate dockets to be sealed. U.S. Court of Appeals for the Third Circuit, Notice to the Bar (Nov. 4, 2008) (*available at* http://www.ca3.uscourts.gov/Public%20Notices/seal_dockets_webNov08.pdf). The announcement was made after a legal newspaper challenged a ruling by the Third Circuit affirming the sealing of the docket in a Title VII employment discrimination case.

127. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 711 (6th Cir. 2002).

128. *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 221 (3d Cir. 2002).

129. *Detroit Free Press*, 303 F.3d at 696–700.

130. *Id.* at 709. See also Levine, *supra* note 103, at 1790 (“The most pressing problem with the mosaic argument is, of course, that there is no way for a court to second-guess the government’s assertion that an information release will implicate national security.”).

Because the government sought blanket closure of all deportation proceedings that it designated as “special interest,” closure was not narrowly tailored to the facts of individual cases.¹³¹

In *North Jersey Media Group*, a divided Third Circuit panel came to the opposite conclusion. The court concluded that a blanket closure order on “special interest” immigration proceedings was appropriate because a case-by-case approach to closure decisions could itself tip off terrorists as to ongoing government investigations.¹³² Although closure of the hearings amounted to “a complete information blackout,” the court was ultimately persuaded by the FBI’s mosaic argument.¹³³ The court found insufficient evidence that deportation proceedings had historically been open, and also held that it was illogical to apply a presumption of openness when the executive branch had identified the hearing as a national security threat: “[s]ince the primary national policy must be self-preservation, it seems elementary that, to the extent open deportation hearings *might* impair national security, that security is implicated in the logic test.”¹³⁴ The Supreme Court denied certiorari, leaving the split intact.¹³⁵

Some courts have made efforts to preserve some degree of transparency, even when the cases have national security implications. In *Parhat v. Gates*,¹³⁶ considering a request by the government to seal all unclassified law enforcement information contained in filings related to a Guantanamo detainee, the court admonished the government for its “generic explanation of the need for protection” which “provid[ed] no rationale specific to the information actually at issue in th[e] case.”¹³⁷ The court provided the government with 30 days to make a specific justification for secrecy related to that proceeding.¹³⁸ Similarly, in the criminal case of Zacarias Moussaoui, who was convicted for his participation in the 9/11 attacks, the Fourth Circuit held that the government must justify continued sealing of non-classified information, and bifurcated oral argument to allow for as much of the

131. *Detroit Free Press*, 303 F.3d at 710.

132. *North Jersey Media Group, Inc.*, 308 F.3d at 218. Judge Sirica dissented, arguing that case-by-case review was neither impracticable nor a threat to national security. *Id.* at 227–29.

133. *Id.* at 200–03 (summarizing the affidavit of the FBI’s counter terrorism chief).

134. *Id.* at 202 (emphasis added). The court quoted extensively from the affidavit of the FBI’s counterterrorism chief, which contained a litany of harms that might occur from open immigration hearings. *See id.* at 218. Accepting these harms at face value, the court stated: “We are quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise.” *Id.* at 219.

135. *North Jersey Media Group v. Ashcroft*, 538 U.S. 1056 (2003).

136. 532 F.3d 834, 835 (D.C. Cir. 2008). *Parhat* is one of hundreds of cases in which a Guantanamo detainee has sought review of his detention.

137. *Id.* at 836.

138. *Id.* at 837.

proceeding to take place in open court as possible.¹³⁹ The district court in that case issued orders limiting the length of time for which orders can be sealed.¹⁴⁰

Two district courts in the District of Columbia recently rejected broad, indefinite requests for secrecy. In *In re N.Y. Times Application*, the court unsealed search warrant affidavits from a completed investigation into a series of anthrax attacks on government and media offices.¹⁴¹ The court redacted the affidavits to conceal the identity of a confidential informant, but otherwise rejected the government's request that the records be sealed indefinitely.¹⁴²

Similarly, in *In re Guantanamo Bay Detainee Litigation*, the court rejected a mosaic theory argument to justify sealing of factual information about the arrests and detentions of hundreds of suspected terrorists housed at Guantanamo Bay.¹⁴³ The government had resisted disclosure of the information, arguing that "the sum of small pieces of information such as those contained in the returns at issue here 'can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.'"¹⁴⁴ The court, however, found that argument "devoid of specificity."¹⁴⁵

4. *The Risks of Access*

Transparency in the judicial system has its risks. For example, when Sheikh Omar Abdel Rahman was on trial for a plot to bomb several New York targets in 1995, the government revealed a list of 200 unindicted alleged co-conspirators, at least some of whom had been unaware that they were being investigated by the government.¹⁴⁶ Some, such as former Attorney General Michael Mukasey, have even argued that the 9/11 hijackers used

139. *United States v. Moussaoui*, 65 Fed. Appx. 881, 887–90 (4th Cir. 2003). The court, however, declined to conduct a de novo review of the government's decision to classify certain information. *Id.* at 887 n.5.

140. *United States v. Moussaoui*, No. 01-CR-455A, 2002 WL 32001783, at *2 (E.D. Va. Sept. 27, 2002).

141. *In re N.Y. Times Application*, 585 F. Supp. 2d at 86.

142. *Id.*

143. *In re Guantanamo Bay Detainee Litigation*, 630 F. Supp. 2d 1, 6–7 (D.D.C. 2009).

144. Respondents' Response to Press Applicants' Motion to Intervene at 11, *In re Guantanamo Bay Detainee Litigation*, 630 F. Supp. 2d 1 (D.D.C. 2009) (Misc. No. 08-0442) (quoting *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978)). The government also argued that it accidentally released some classified information in its filings to the court, and needed an unspecified amount of time to review its filings and remove the classified information. *Id.*

145. *In re Guantanamo Bay Detainee Litigation*, 630 F. Supp.2d at 6. The court set a deadline for the disclosure of the information. *Id.* at 7.

146. 9/11 COMMISSION REPORT, *supra* note 42, at 472 n.8 (noting that the unintended effect of these trials). It should be noted that the government did not apparently seek a protective order for this information. See JAMES J. BENJAMIN, JR. & RICHARD P. ZABEL, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 88 (2008) (available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>).

information made public by the trials of the planners of the 1993 World Trade Center bombing to avoid detection by government authorities.¹⁴⁷

Openness may also have indirect costs. Opening all court files may discourage the use of judicial institutions that are themselves designed to act as a check on executive power, such as the Foreign Intelligence Security Court.¹⁴⁸ Open courts may also discourage the government from prosecuting national security crimes. For example, the Justice Department recently decided to drop espionage charges against two lobbyists in part because the prosecution may have resulted in the disclosure of classified information.¹⁴⁹

The extent to which public court records have actually compromised national security is disputed, however.¹⁵⁰ Federal courts have a number of tools that seek to balance the tradition of openness with the need for secrecy. Most prominent among these is the Classified Information Procedures Act, which governs the use of classified information when the information must be used in a federal prosecution.¹⁵¹ A 2008 study of terrorism prosecutions in the federal courts concluded that any security breaches that have occurred in federal terrorism prosecutions have happened because the government itself

147. See Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15. Mukasey, who later became the United States Attorney General, argued that testimony about a cell phone battery in trial of the World Trade Center bombers tipped off al-Qaeda that one of its phones had no longer secure. *Id.* Mukasey concluded that “such prosecutions risk disclosure to our enemies of methods and sources of intelligence that can then be neutralized. *Id.* Disclosure not only puts our secrets at risk, but also discourages allies abroad from sharing information with us lest it wind up in hostile hands.” *Id.* See also Pozen, *supra* note 7, at 650 (describing “widespread belief” in intelligence community that the trial of the first World Trade Center bombers had led to security breaches).

148. See *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 496 (FISA Ct. 2007) (declining broad request for release of FISC records); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1259 (W.D. Wash. 2002) (recognizing the propriety of closure when publicity would frustrate the very purpose of the proceeding).

149. Jerry Markon, *U.S. Drops Case Against Ex-Lobbyists*, WASH. POST, May 2, 2009, at A01 (quoting Justice Department officials).

150. A 2008 study of terrorism trials in the federal courts disputed some accounts of the security breaches that had allegedly occurred in the federal courts, including the one discussed in the Mukasey article. See BENJAMIN & ZABEL, *supra* note 146, at 88. The authors of the report found no evidence of “any important security breach in any terrorism case in which CIPA has been invoked.” *Id.* See also Bill Keller, *Trials and Tribulations*, N.Y. TIMES, Dec. 15, 2001, at A31 (“Neither the Justice Department nor prosecutors in New York could recall for me a single specific instance when national security was actually compromised during [the World Trade Center bombing trials] in New York.”); Klaris et al., *supra* note 32, at 804–17 (describing federal terrorism trials since the 1980s and noting that the trials remained largely open with relatively few restrictions on access).

151. 18 U.S.C. app. § 3 (2006). When classified information must be used in a criminal proceeding, CIPA provides for in camera review by the presiding judge to determine if the information is relevant to the proceeding. 18 U.S.C. app. § 6(a), (d). If the judge determines that the information is relevant, the judge may order the government to delete certain classified parts of the information, present an unclassified summary of the information, or stipulate to what the classified information would tend to prove. 18 U.S.C. app. § 4. Of course, CIPA itself does not have any bearing on public access rights. See, e.g., *Ressam*, 221 F. Supp. 2d at 1259.

failed to appropriately protect the information, not because the courts have improperly refused to close dockets or proceedings.¹⁵²

III. Analysis

This section argues for strict scrutiny of requests to seal documents in federal courts. First, this section discusses the importance of document access in the courts. Next, this section argues that mosaic theory has the potential to undermine strict scrutiny by allowing for general, categorical secrecy. This section also argues that the federal courts have a long track record of appropriately handling sensitive information. Although deference may be appropriate in some cases, the judiciary must remain vigilant in protecting fundamental public access rights.

A. Denials of Access to Documents Infringes on First Amendment Rights

1. *History Supports Broad Access Rights to Court Records.*

The salutary effects of openness in the courts have been discussed above.¹⁵³ The courts have long recognized the public nature of their work.¹⁵⁴ In *Richmond Newspapers*, the Court traced the history of open criminal proceedings back to the beginnings of the Anglo-American common law tradition.¹⁵⁵ A presumptive public access right to judicial documents has similarly deep roots.¹⁵⁶ Although courts have historically put limits on the enforceability of the right and the class of documents to which the presumptive access applies, such limits are usually intended to protect the privacy interests of private civil litigants.¹⁵⁷ Due to the relationship between national security information and government operations, such interests are virtually nonexistent in national security cases, particularly in cases where the performance of public officials is examined or where the defendant is on trial for acts of terrorism. In addition, even where courts have limited access, the circumstances under which documents are sealed are typically narrow.¹⁵⁸

152. BENJAMIN & ZABEL, *supra* note 146, at 88. *See also* Klaris et al., *supra* note 32, at 835–36 (collecting anecdotal evidence of the successful use of CIPA to protect classified information).

153. *See supra* notes 18–38, 79–96 and accompanying text.

154. *See supra* notes 80–83 (discussing the historical context of public access).

155. *See supra* note 87 and accompanying text.

156. *See supra* notes 80–83 and accompanying text (discussing common law history to documents).

157. *See supra* note 81 and accompanying text (discussing the practice of limiting access to documents in English and American courts).

158. *See supra* notes 80–82 and accompanying text.

2. *Access to Documents Plays a Crucial Role*

The rationales for an open judicial system have added significance with respect to records maintained by the courts, particularly when the case has national security implications. Cases involving national security necessarily deal with information that is of broad public interest to people outside of the geographic region in which the proceeding is taking place. Thus, as the interest in the case increases, the ability of interested individuals to monitor the proceedings decreases. Documents on file with the court may provide for more complete and comprehensive news coverage of the event, and in fact may be the sole means by which an interested citizen can follow the case on his or her own. Thus, although a court's decision to close a proceeding is not necessarily ameliorated by providing access to documents related to that proceeding,¹⁵⁹ access to documents serves an even more important purpose and should be subject to an even more rigorous analysis.

Access to documents also could provide insight into proceedings for which access has itself been denied. Opening a search warrant proceeding, for example, would not make sense because allowing access to the proceeding at which the warrant is granted could alert the subject of the warrant, undermining the very purpose for the proceeding.¹⁶⁰ Allowing post-investigation access to the warrant affidavit, however, would not implicate this concern. It would also protect against government overreaching, and would provide for a greater public understanding of the case, which was one of the animating principles of the *Richmond Newspapers* line of cases.¹⁶¹ Restricting access to paper records of legitimately closed proceedings would also result in a presumption of permanent secrecy, which almost certainly is much broader than necessary to protect the government's interests.¹⁶²

B. The First Amendment Demands a Detailed Argument to Support Closure

There is no question that the government has a compelling interest in national security.¹⁶³ This is only the beginning of the First Amendment analysis, however. After establishing a compelling interest, the government must provide that closure is narrowly tailored to that interest; i.e., it must identify for the court exactly what information compromises national security

159. See Levine, *supra* note 103, at 1764.

160. See *supra* note 39 and accompanying text (discussing the necessity of closing a proceeding where the very purpose of the proceeding would be frustrated by publicity).

161. See *supra* notes 84–93 and accompanying text (discussing *Richmond News*).

162. See *supra* notes 92, 100 and accompanying text (discussing consistency between First Amendment right of access analysis and First Amendment analysis in other contexts). See also *supra* note 115 (discussing some courts' approach of sealing documents of closed proceedings).

163. See *supra* note 24 and accompanying text (recognizing a compelling government interest in national security).

and how it does so.¹⁶⁴ As the Court in *Press-Enterprise I* held, the court must make specific findings as to why closure is necessary.¹⁶⁵ For the court to make such findings, of course, the government must provide a basis for doing so.¹⁶⁶

Mosaic theory threatens to weaken the narrow-tailoring requirement by allowing for a more general, less-detailed argument. For example, in *CNSS*, the government's mosaic argument was based on an affidavit that had previously been used in a completely different case.¹⁶⁷ As narrow tailoring requires a specific connection between the document and the potential harm, a generic affidavit could not be used to support closure under the First Amendment right of access. Moreover, there is a difference between a generalized assertion of a threat and a particularized argument as to what is threatening. This particularized argument should not be impossible for the government to make; given the executive branch's own skill at constructing intelligence mosaics,¹⁶⁸ the government itself should be able to explain to the court how the information could be aggregated with other information in a useful (and harmful) way.¹⁶⁹ When not even the government, with its own sophisticated mosaic-making capability, can explain the threat posed by a piece of information, the court should be skeptical that such a threat exists.

The fundamental nature of the rights at stake in a First Amendment access case also support a searching review of the justification for secrecy. The First Amendment was intended to preserve a healthy democracy by protecting the free flow of information.¹⁷⁰ Although the Supreme Court has indicated that the burden to justify newsgathering restrictions is less onerous than that to justify a prior restraint,¹⁷¹ a restriction on information has a similar chilling effect on public discourse. As the *Mukasey* court recognized, even a minor infringement on First Amendment rights demands a searching judicial inquiry.¹⁷² It therefore rejected Congress' attempt to circumscribe its standard of deference, and required the government to support its secrecy argument with more than conclusory speculation.¹⁷³ Along the same lines,

164. See *supra* note 67 and accompanying text (explaining the standard of review for the gag provision of the Reauthorization Act).

165. See *supra* note 101 and accompanying text.

166. See *supra* notes 69–71 (requiring specific facts to justify an infringement of First Amendment rights).

167. See *supra* note 58.

168. See *supra* note 42 (describing the government's use of mosaic intelligence gathering methods).

169. See Wells, *supra* note 26, at 876. See also Pozen, *supra* note 7, at 677.

170. See *supra* notes 19–20 and accompanying text.

171. See *supra* notes 22–23 and accompanying text.

172. See *supra* notes 69–71 and accompanying text.

173. See *supra* note 70 and accompanying text.

because secrecy requests also implicate important First Amendment rights, courts should require a secrecy request to be supported by a detailed argument.

C. Courts Should Protect Only as Much Information as Necessary to Protect National Security

Because mosaic theory posits that the risk of openness is basically impossible to know, mosaic arguments could be used to impose almost limitless secrecy.¹⁷⁴ Broad secrecy carries the potential for abuse; as *Ex parte Quirin* and *The Pentagon Papers Case* illustrate, national security can be used as a pretext to shield authorities from public scrutiny.¹⁷⁵ Thus, even recognizing mosaic intelligence gathering as legitimate, the degree of secrecy that a generic mosaic argument would allow for creates a potential for abuse, and is plainly at odds with the narrow tailoring required by the First Amendment.

It is easy to appreciate the risk posed by some information, such as the identity of a confidential informant or certain techniques used in law enforcement and intelligence-gathering.¹⁷⁶ Even so, narrow-tailoring dictates that only information that compromises national security should be hidden from public view, and the information should be hidden only as long as is necessary to serve the interest.¹⁷⁷ The court, therefore, can simply order that the information be redacted, and may impose a deadline for disclosure.¹⁷⁸

The narrow tailoring requirement would not, however, be consistent with removing an entire case from a public docket, as occurred in *M.K.B.*¹⁷⁹ The level of secrecy in that case had the effect of allowing the entire case to take place outside of public view.¹⁸⁰ As the Third Circuit recently recognized, the information contained in docket sheets does not implicate any legitimate need for secrecy.¹⁸¹ Thus, such a drastic curtailment of access would generally not be warranted, especially without any evidence of specific findings to justify closure.¹⁸²

174. See *supra* note 130 and accompanying text (quoting *Detroit Free Press*). See also *supra* notes 55–63 and accompanying text (discussing controversy of broad mosaic claims in FOIA jurisprudence).

175. See *supra* notes 26–38 and accompanying text.

176. See *supra* note 142 and accompanying text (discussing the redaction of confidential informants names).

177. See *supra* notes 136–42 and accompanying text (discussing less restrictive means than total closure).

178. See *supra* note 142 and accompanying text (discussing redaction of confidential informant's case in *In re N.Y. Times Application*). See also *supra* notes 138, 140 (discussing court-imposed deadlines for producing documents).

179. See *supra* notes 121–26 and accompanying text.

180. See *supra* note 125 and accompanying text.

181. See *supra* note 126 (discussing the Third Circuit's recent memorandum to the bar that appellate dockets would be presumptively open).

182. See *supra* note 126 and accompanying text (noting lack of specific findings in *M.K.B.*).

D. Narrow Tailoring Requires Case-by-Case Analysis

Case-by-case review is neither impracticable nor at odds with national security.¹⁸³ Court access cases generally implicate a narrower kind of disclosure than many FOIA cases. In *CNSS*, for example, the plaintiff sought to use the FOIA to obtain access to a broad range of information.¹⁸⁴ Whether that case was correctly decided or not, it is easier to see how such sweeping disclosures could have revealed important details about a government investigation. By contrast, a case involving one party, such as *Parhat*, has a much smaller likelihood of allowing an interested observer to draw broad inferences about an ongoing investigation.¹⁸⁵ By the same token, such a case presents a smaller administrative burden on the government to show how the individual might fit into the mosaic. This may explain why the same judge who embraced the mosaic argument in *CNSS* rejected a general request for secrecy in *Parhat*.¹⁸⁶

Even where a group of cases present similar facts or procedural postures, broad, categorical arguments are inconsistent with First Amendment access rights. In the *Guantanamo Bay Detainee* decision, for example, the court refused to allow a general mosaic argument to apply to the entire set of cases.

E. Federal Courts Can Effectively Exercise a Searching Review

Because the mosaic theory relies on the judiciary's comparative lack of expertise in national security, mosaic arguments seem to presume that federal judges are unable to grasp the potential danger posed by the release of information.¹⁸⁷ This does a disservice to the judiciary and ignores the federal courts' long track record of dealing with sensitive national security information.¹⁸⁸ Under CIPA, in particular, judges are called upon to review and evaluate highly sensitive information, including classified information.¹⁸⁹ The courts' experience with CIPA also demonstrates that judicial review of

183. See *supra* note 132 and accompanying text (discussing Judge Sirica's dissent in *North Jersey Media Group*).

184. See *supra* note 57.

185. See *supra* note 137 and accompanying text.

186. See *supra* notes 56, 136.

187. See Wells, *supra* note 26, at 854 ("[Mosaic theory] uses the judge's lack of expertise as a reason to refuse to provide information that might educate the judge (on the never quite-spoken assumption that it would be mishandled), thus further hampering judicial resolution of disputes."). See also Pozen, *supra* note 7, at 664 ("Whereas a typical [FOIA] exemption claim involves only one piece of information, the standard argument runs, mosaic claims involve multiple pieces of information interacting with each other in potentially nonobvious ways; as a result, mosaic claims are more difficult for judges to evaluate and so demand additional deference.").

188. See *supra* notes 151–52 and accompanying text (describing procedures available to federal courts for dealing with sensitive or classified information).

189. See *supra* note 151 and accompanying text.

secrecy requests need not itself be a security risk.¹⁹⁰ As one commentator noted, there is no record of any security breach in a case where CIPA has been invoked.¹⁹¹ Although a lack of security breaches does not, by itself, mean that a breach will not occur, the federal judiciary's successful use of CIPA does indicate a degree of competence to evaluate and handle sensitive information.

Requiring the government to explain how documents containing potentially sensitive information could compromise national security if disclosed to the public does not jeopardize public safety. The *Mukasey* court, among others, endorsed the propriety of in camera review of the arguments in support of secrecy.¹⁹² Even the judge's order can be filed and reviewed under seal. Although in camera review and sealed orders do not provide the public with access—and thus has the disadvantage of removing the judicial process from public view—the requirement that the court make contemporaneous and detailed findings in turn requires the government to present a basis for those findings. The judiciary thus acts as a check on the executive's power to keep secrets.¹⁹³

F. Overreliance on Mosaic Theory Undermines Judicial Independence

As recent cases, such as *Mukasey* and *Mohamed*, recognize, the judiciary is an independent, co-equal branch of government.¹⁹⁴ The judiciary, not the executive branch, has traditionally had control of the evidence in cases brought before it, and therefore judges have not been chary about independently evaluating state secrets cases.¹⁹⁵ Likewise, the judiciary has a long history of controlling public access to the courts.¹⁹⁶ Moreover, it is the role of the courts, not the executive, to say when state action infringes on constitutionally protected rights.¹⁹⁷ As in other facets of national security litigation, therefore, federal judges should be skeptical of vague, categorical arguments in support of secrecy.

G. Deference May be Appropriate in Some Cases

The “substantial probability” standard articulated in *Press-Enterprise II* leaves some room for uncertainty about the actual threat presented by of

190. See *supra* notes 150–52 (describing history of terrorism prosecutions in the federal courts).

191. See *supra* note 152 and accompanying text.

192. See e.g., *supra* note 70 and accompanying text (describing the in camera review of evidence in *Mukasey*).

193. See *supra* notes 71, 74–76 (describing the necessity of judicial checks on executive secrecy in the NSL and state secrets context, respectively).

194. See *supra* notes 71, 75 and accompanying text.

195. See *supra* notes 74–76 and accompanying text.

196. See *supra* notes 80–81 (discussing common law history of access).

197. See *supra* note 71 and accompanying text.

disclosure. Deference to executive threat assessment may therefore be appropriate in some cases, even if the court itself may have doubts as to the relationship between the information and the likelihood of harm. That secrecy can be abused does not mean that information control is unnecessary. Federal judges appropriately recognize that foreign and military affairs are complicated areas that are the province of the Executive branch.¹⁹⁸ Thus, where the government can show the existence of a particular threat and provide a substantial connection between the threat and a given piece of information, it may be appropriate to keep the document sealed. Although a judge's decision to release information would be only tangentially connected to any subsequent national security crisis, there could be real-world consequences to imprudent disclosure. Threat assessment is, after all, an inexact science; access jurisprudence does not require that the future be predicted with absolute certainty.

IV. Conclusion

Democracy relies on informed decision-making.¹⁹⁹ Accordingly, courts have recognized that the First Amendment implicitly includes certain informational rights that can only be infringed when the government can articulate a compelling interest and uses narrowly tailored means to advance that interest.²⁰⁰ Court records historically have been an important source of information, and this tradition of openness has contributed to public confidence in the court system and to the fairness of the judicial process.²⁰¹

Information is no less critical (and is perhaps more so) because it relates to national security.²⁰² Because of the structural importance of these informational rights to democracy, and because of the courts' role as a check on the other branches of government, the courts must be vigilant in requiring the government to justify its need for secrecy.

Reliance on mosaic theory threatens the availability of public information by weakening the First Amendment right of access. Although mosaic theory's impact on court secrecy cases so far has been limited, cases such as *North Jersey Media Group* indicate that some courts may be willing to credit mosaic arguments to support broad access restrictions.²⁰³ Such categorical restrictions are plainly at odds with the free flow of information that is

198. See *supra* note 45 and accompanying text.

199. See *supra* notes 19–20 and accompanying text.

200. See *supra* notes 84–103 and accompanying text.

201. See *supra* notes 80–82, 87–88 and accompanying text.

202. See *supra* notes 24–26 and accompanying text (discussing the importance of an informed public).

203. See *supra* note 133 and accompanying text.

fundamental in a democracy, and allow for unbridled executive secrecy.²⁰⁴ A particularized, searching analysis of secrecy arguments is therefore essential to preserve the democratic ideals protected by the First Amendment.

204. See *supra* notes 19–20, 129–31 and accompanying text.

* * *